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Acquired by Character, Not by Money

Kenneth W. Starr

This afternoon, on this special day in the lives of the Class of 1990, I would like to pause with you for just a few minutes and look into the future, to examine the profession to which you are being called as members.

The graduates here today would no doubt agree that pausing and reflecting while in law school is an important thing to do. They might even give some friendly advice to that effect, to the incoming law students who will soon be the Class of 1993 here at this great institution. Back when I was worried about LSATS and law school applications, I was working in Washington, D.C., for the State Department. I had just abandoned graduate school in political science and had made a basic turn in the career road—a turn toward the law.

During that year, I had the good fortune to work with a fellow who was spending the summer in Washington, D.C., between his first and second years of law school at Yale. As was appropriate for a greenhorn wondering about the mysteries of law and law school, I asked this ersatz big brother what advice he would share with me, a fledgling, would-be law school rookie. He thought for a minute and said: “If I had that first year to do over, I would study less.” My spirits rose, as you can well imagine, because I had heard the usual horror stories about that first year of law school. “I would study less,” he went on, “and think more.”

For the record, I think that’s sound advice, not only for law school, but—more relevantly for today’s graduates—sound advice for one’s entire legal career. Unfortunately, in law, as in life, there is little need to think in order just to get by. But, as Aristotle wisely opined that the unexamined life is not worth living, so too one’s life in the profession that our graduates

are today entering should remain—in a constructive, positive spirit—under the gentle watch of a careful eye. Like Nora in Ibsen’s enduring play *A Doll’s House*, we have an obligation to come to know ourselves for what we really are.

The legal profession is at a crossroads. We in the profession are called upon in a fundamental sense to choose what it is that we are all about. I have a gnawing fear that we are gradually, but inexorably, choosing the wrong road.

Several months ago, at the midwinter meeting of the American Bar Association in Los Angeles, the American Bar Foundation took note of the career and contributions of two outstanding individuals. One is a household name in the law, one of our century’s towering figures—Justice Thurgood Marshall.

That was a splendid event. In hearing Justice Marshall, I had a vivid sense of listening to history. There, standing before those many members of the organized bar, was the individual who stood at the podium of the Supreme Court almost 40 years ago (as the president of this great university has done with such distinction so often), and called upon the Court to do the right thing in vindicating the rights of all persons—including schoolchildren—to be free from line drawing because of race.

Counting by race, the Court held, was wrong. It is not only morally repugnant but goes against our basic constitutional values.

For all too long, of course, the Court had turned a blind eye to the constitutional and moral evil of a race-based society. Yet, the Court—and the country—labored under the harsh, corrupt regime of *Plessy v. Ferguson* for over a half century; what is more, the process of dismantling *Plessy*’s quasi-apartheid system was destined to require many more years.

But ultimately the moral vision of basic human dignity and basic human rights assured by our Constitution was translated into law, through the forceful advocacy of Thurgood Marshall and his colleagues, who at the time included my former chief judge on the D.C. Circuit, Judge Spottswood Robinson III.

The leadership of Thurgood Marshall and his colleagues is an integral part of a noble and enduring tradition in our profession. Not long ago I had the privilege of addressing the nation’s oldest organized bar, the Philadelphia Bar Association. That bar has many traditions, but one of the proudest is to give to the leader of the bar, upon his or her retirement as chancellor of the bar, a small gold box. The box is a replica of one given two and a half centuries ago to the greatest of Philadelphia lawyers, Andrew Hamilton. It was given to Mr. Hamilton for his remarkable defense of freedom of the press in the immortal trial of John Peter Zenger. The little gold box, used in bygone years as a snuff box, bears a wonderful inscription which captures that which is highest and noblest in our profession—“acquired not by money, but by character.”

A generation after that great trial in Philadelphia, 55 delegates gathered in that very city to establish a proposed framework of government. They were great men at the convention, and some of the greatest were not lawyers.

But when one examines the records of that convention, one quickly discovers that the intellectual leaders—the true shapers of our government—were lawyers. From Madison and Randolph of Virginia, to Wilson of Pennsylvania, Elsworth of Connecticut, and Paterson of New Jersey, these were individuals who had been called to the bar.

Tocqueville, that astute observer of American democracy, took note in his magnificent work, *Democracy in America*, of the extraordinary role that the law—and thus lawyers—plays in the governance of the American republic. The landed aristocracy, the merchant class of New England and the Mid-Atlantic states, and the great pioneers of the West failed in the main to rise to the pinnacles of power in our representative democracy. To be sure, the country on occasion looked, as do many nations, to its heroes in war to take the helm, but its leaders and representatives have been primarily those called to the legal profession. For every Washington, Jackson, Grant, and Eisenhower, there are several Adamses, Jeffersons, Madisons, Monroes, Lincolns, and Roosevelts—those called to the law.

Indeed, the importance of law—and thus of those who practice, enforce, and interpret law—was abundantly evident to those sages who had not had the good fortune to read the law and to apprentice themselves to a wise lawyer of ability and integrity. It was in his first term of office that our first president, our military-hero, nonlawyer president, George Washington, wrote to the Supreme Court as follows:

I have always been persuaded that the stability and success of the National Government, and consequently the happiness of the American people, would depend in a considerable degree on the interpretation and execution of its laws.

That statement was written two hundred years ago this month—in the early part of April 1790. And the force of the statement resonates across the many generations and stands as a tribute to the function of the bar, of the bench, and of others entrusted with the care and custody of the law. The task was admirably stated by former Attorney General Griffin Bell, in the title of his wonderful memoir, “Taking Care of the Law.”

That, ultimately, is the duty you will soon take on as members of the profession—to take care of the law. That, of course, is the duty imposed by the Constitution upon the president of the United States, who takes an oath of office prescribed by the Constitution, to take care that the laws be faithfully executed. It is a duty that rests upon all members of the executive branch (including your own Professor Lynn Wardle, laboring with us so ably at the Justice Department).

But each person in our profession is called upon to take part in that process that President Washington described. Each is to do his or her part in assuring the rule of law and fidelity to law.

It's time now to come back to the crossroads that I mentioned before.

In oral argument (as I'm sure President Lee would agree), one of the most important aspects of advocacy is to have thought the case through—to have a well-developed theory of the case. Obviously, one must know one's case. But the good lawyer must also have a well-conceived theory of the case. It will not do when the hard hypothetical comes from the bench to say in lame response: "But, Judge (or Justice), that's not this case!"

Here, then, is my theory (or, more precisely, my proposition)—the great tradition of public service of which our profession can justly be proud is in danger. The tradition of Andrew Hamilton, the tradition of the Framers, and the tradition of Thurgood Marshall is increasingly in jeopardy. That tradition is in danger by virtue of our losing our way, losing our sights as to what the profession should be all about. The profession should be a way, either through public service or through private practice, to be of service to the public and ultimately to the cause of justice. Justice—that which Sir Thomas More described so admirably as the great idea of God and the great ideal of mankind. Regrettably, the profession is being seen less as a way of serving the cause of justice and more as a way to make a handsome living, perhaps to become rich, and maybe even a little famous.

We are seeing this process at work in my office. We are very fortunate in the Office of Solicitor General to be blessed with some of the finest legal talent in the country. Our 23 lawyers have credentials that we would be pleased, in a nonarrogant way, to put up against any law firm, public or private, anywhere in the country.

But as the years have gone by, it has become increasingly difficult to *keep* these splendid lawyers in public service. They may be with us today, but they will likely be gone tomorrow. Rare is the person who, at the outset, commits himself or herself to public service and then stays there. Indeed, if the person has done well in law school, the person may never enter public service. Success in the profession becomes translated into partnership and high income levels. Success means prosperity. The successful firm is the prosperous firm. Increasingly, the theme of our profession is "acquired by money, not by character."

Now there are severe opportunity costs, as the economists would say, occasioned by the law-as-business environment in which the profession finds itself. Most directly, one can see a direct correlation between increases in earned income and decreases in professional satisfaction (and basic human happiness). It wasn't so many light years ago that I entered this profession and with one of the nation's leading law firms. The emphasis at the time was on the quality of one's work. Make it good. No, do better than that. Do the very best. Be the very best.

And that emphasis did not translate so overwhelmingly into the green-eyeshades folks examining with exacting scrutiny the total number of billable and collectible hours. Oh, to be sure, that factor was highly relevant; it was important. But its place in the relative scheme of things was seen in the bottom-line fact that billing around 1,700 hours or 1,800 hours was right on target. And that left time—time to think, time to refresh oneself mentally, time to become involved in the community, in the church, and to be truly engaged in the family.

Something else is being lost—something very important to the well being of the profession. And that is the ancient sense in the profession that one owes something to one's country, to one's community, and to one's profession. That was, of course, the spirit at the founding of the American republic. To their great moral credit, our forebearers who devoted themselves to public service impoverished themselves in the process. In his later years, Jefferson had to sell his much beloved books to the Library of Congress to avoid acute financial embarrassment. He had not been back home at Monticello building a financial empire; he had been living life greatly, remembering and paying attention to what T. S. Eliot was destined so wisely to call "the permanent things." And he died a poor man.

"Acquired by character, not by money." It was, of course, the Apostle Paul who warned about the corrupting power of money or, more precisely, the love of money. Lord Acton, centuries later, was also right about the corrosive, corrupting nature of power. That is precisely why our system of government is adorned with the elaborate set of checks and counterweights, to prevent the accumulation of power in the hands of a single person or branch of government.

Where is the check against the corrosive power of the desire for money? As a believer in the Jeffersonian tradition of limited government, and as a subscriber to Lord Acton's maxims, the answer does not, in my opinion, lie in the all-too easy solution in this century—to call upon government to solve the problem. Anyone who believes that government is mystically endowed with magical answers would do well to recall Bismarck's maxim, that one should never see either laws or sausages made. To believe that Washington has all the answers is, in my humble judgment, woefully misguided.

That is to say, it would be misguided, and incompatible with our traditions, to embark on a zealous regulatory mission to regulate lawyers and law firms and law fees. Let's leave that to the marketplace and the profession itself.

But we lawyers are making ourselves too costly, especially in a time when we are increasingly concerned about American competitiveness. Whether we are unduly litigious as a society, (as I think we are), or whether litigation serves entirely benign purposes in an astonishingly pluralistic society in which we take every person's rights seriously (as part of

our cultural heritage of rugged individualism and, put more felicitously, the dignity of each human being), lawyers simply charge too much for their services. We should live comfortably, but we should not be so pricey that honest, hardworking Americans can't afford to talk to us.

Proposing a restructuring of the delivery of legal services in the 1990s goes wildly beyond what I can hope to accomplish in this brief set of reflections on this happy occasion. What I do think, however, is that the law-as-business movement is of such increasing force that public service is likely to provide an important and attractive career alternative in the 1990s. And I encourage thoughtful, prayerful consideration of that very alternative—even if only for a while—as the future now stands before you with its promise and hope.

That is, with a good solid dose of humility, with a firm, good old American common-sense notion that by entering public service I am emphatically not going to save the world, public service—even if only for a brief while—provides a modest way of restoring, in each individual's own way, the original moral vision of our profession.

Everyone needs heroes. At a minimum, one needs fine examples. I cannot think of a better standard bearer, a finer example, a more splendid hero than that of your own president of this great university, a remarkable individual who has served his country so ably in the highest traditions of our profession.

It was Holmes who said, wisely and correctly, that one can live greatly in the law as elsewhere. Public service, I venture to predict, will make a real comeback in the 1990s, even with the inevitable—and I think not inappropriate—compensation gap between the private and public sectors. Despite one's politics—whether they are on the left or the right on the political spectrum, or somewhere in between—the call of public service represents that which is best and noblest in our tradition as a profession.

Jefferson, trained in the law in beautiful Williamsburg, left his heirs precious little by way of the world's possessions. But he left the country and the entire human family a record of astonishing accomplishment and contribution. He left the world poor, but he left the world itself immeasurably enriched by what he was and what he did.

He was imperfect, of course, falling short in countless ways, naturally, as do we all. It was, again, the Apostle Paul who wrote that “we all sin and fall short of the glory of God.” But his was an ennobling life, a lawyer dedicated to the higher, loftier things, to service of his country, and to the permanent things of life, that which can be acquired not by money, but by character.

This w convocation address was given at the Provo Tabernacle on April 27, 1990. Reprinted from the Clark Memorandum, fall 1990, 8–11.

Kenneth W. Starr received his JD from Duke University in 1973, clerked for David W. Dyer of the U.S. Court of Appeals for the Fifth Circuit 1973–74, and clerked for Chief Justice Warren E. Burger of the U.S. Supreme Court 1975–77. He served as counselor to U.S. Attorney General William French Smith 1981–83, judge for the U.S. Court of Appeals for the D.C. Circuit 1983–89, solicitor general of the United States 1989–93, and independent counsel 1994–99. He is the author of First Among Equals: The Supreme Court in American Life (2002). He is currently of counsel at Kirkland & Ellis in Los Angeles and the Duane and Kelly Roberts Dean and Professor of Law at Pepperdine University School of Law in Malibu, California.